

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

75-4051

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To be argued by
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United States Court of Appeals
FOR THE SECOND CIRCUIT

FEDDERS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL TRADE COMMISSION.

PETITIONER'S BRIEF

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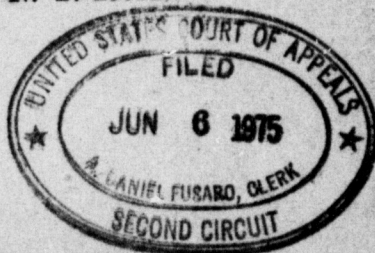


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The Issues Presented for Review

1. *Scope of the Final Order.* The Commission has not challenged and does not challenge any performance characteristic claim made by respondent, whether as to the air cooling, dehumidification or circulation characteristics or capabilities of its air conditioners, or as to any other claimed characteristic or capability. It is undisputed that the only offending conduct charged, and the only offending conduct proved, was confined to the falsity of a claim of *uniqueness* only, to wit, that respondent's air conditioners were the only ones which possessed the characteristic known as "reserve cooling power". Nevertheless the scope of the Final Order embraces not only false claims of uniqueness, but also any

false claims relating to air cooling, dehumidification or circulation. Respondent maintains that, for this reason, the Final Order is of impermissible scope. This issue is covered by Point I of the Argument.

2. *Modification necessary in respect to subjective claims.* Respondent further maintains that in any event, for reasons more fully set forth in Point II of the Argument, Paragraph 2 of the Final Order should be modified so as to make clear that respondent, when making a basically subjective claim, incapable of the objective proof required by the Final Order, does not violate its terms.

Statement of the Case

Nature of the Case

This is a petition by respondent, Fedders Corporation, to review a Final Order of the Federal Trade Commission (the "Commission"), issued on January 14, 1975, directing respondent to cease and desist from certain advertising practices. The Commission's Opinion was rendered by Commissioner Paul Rand Dixon.

Proceedings Before the Commission

The Commission, by order served on respondent on or about October 15, 1971, required respondent to submit a Special Report containing its substantiation for eight advertising claims contained in various advertisements which had appeared during the months of May and June, 1971, concerning certain room air conditioners of respondent's manufacture.

In compliance with the order, respondent timely filed the Special Report on December 22, 1971. The Special Report set forth respondent's substantiation for seven of the eight claims involved. As to the remaining claim, which was to the effect that *only* respondent's air conditioners

had the characteristic or feature known as "reserve cooling power" respondent stated that "this claim is not substantiated and [respondent] does not propose to include it in any further advertising copy which [respondent] may promulgate."*

Extensive negotiations ensued pursuant to Part 2 of the Commission's Rules of Practice in an effort to resolve this matter by consent order. These efforts proved unsuccessful.

The Pleadings

The Commission filed its original complaint herein on June 11, 1973, some eighteen months after respondent filed the Special Report. The complaint as finally amended (the "Final Complaint"), charged respondent, in essence, (Initial Decision, Preliminary Statement, first paragraph; Appendix, pp. 39a-40a) with disseminating advertisements containing the claim that the performance characteristic known as "reserve cooling power"*** was a feature unique to respondent's room air conditioners, whereas in fact that feature is also possessed by comparable room air conditioners manufactured by other companies.

In its answer to the Final Complaint (the "Final Answer") respondent conceded the dissemination and falsity of the challenged advertising claim, but denied that, as had been charged, such claim was typical of respondent's advertising and that it had the tendency to mislead a substantial portion of the purchasing public, and averred that the challenged claim was so infrequently made and constituted so

* It is undisputed that contemporaneously with respondent's filing of the Special Report on December 22, 1971, respondent discontinued, and did not resume *any* reference to reserve cooling power in its advertising (Initial Decision, p. 23, first paragraph; Appendix, p. 65a).

** During the course of the proceedings the parties stipulated that, for all purposes of this proceeding, "reserve cooling power" means "ability to function satisfactorily under conditions of extreme heat and humidity" (Appendix, p. 38a).

small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant.

As a first affirmative defense respondent pleaded its good faith discontinuance of *all* advertising material relating to reserve cooling power, including reserve cooling power claims which asserted that that characteristic was unique to respondent and reserve cooling power claims which did not assert such uniqueness.

As a second affirmative defense respondent alleged that the scope of the relief sought in the proposed order attached to the Final Complaint was impermissibly broad.

The Form of the Evidence Submitted

All of the evidence submitted was in the form of written stipulations, joint exhibits, or respondent's exhibits received in evidence without objection. These stipulations and exhibits are hereinafter discussed in the Statement of the Facts. No witnesses were tendered by either side.

The Initial Decision

The Administrative Law Judge (Ernest G. Barnes) in his Initial Decision rendered July 15, 1974, after making voluminous Findings of Fact and Conclusions of Law, rejected respondent's averment of the insubstantial impact of the offending claims, as well as respondent's affirmative defenses of discontinuance and overbroad scope of the proposed order. His Initial Order, in pertinent part, required the respondent to cease and desist (i) from making any representations as to the uniqueness of its air conditioners in any material respect unless such is the fact, and (ii) from making any statement or representation as to *any performance characteristic* of any air conditioner without a reasonable basis therefor at the time such representation is made, such basis to consist of "competent, scientific, engineering or other similar objective material or industry-wide stand-

ards based on such material". The Initial Order further provided that respondent must maintain, for a three-year period, documentation in support of any advertising claim disseminated by respondent which concerns the uniqueness of, or any performance characteristic of, any of respondent's air conditioners.

Final Order of the Commission

Upon appeal to the Commission, the matter was heard before the Commission on November 18, 1974. Chairman Engman, Commissioners Dixon, Thompson and Nye attended the hearing. Commissioner Hanford was absent but participated in the decision, which was unanimous. The Commission's Opinion, and the Final Order issued pursuant thereto, adopted the wording of the Initial Order, Findings of Fact and Conclusions of Law of the Administrative Law Judge, except that the performance characteristics covered by the Final Order were narrowed so as to embrace instead of all performance characteristics, only the characteristics known as air cooling, dehumidification, and circulation.*

Statement of the Facts

Although respondent does not challenge the Commission's finding that respondent disseminated advertisements violative of applicable law, and confines the issues raised on this appeal to issues concerning the overbreadth of the Final Order much of the evidence presented to, and received by, the Administrative Law Judge, for reasons set forth in the Argument, *infra*, bears on the issue of permitted scope of the Final Order as well as upon the issue, no longer challenged, as to whether a violation was committed.

* The Commission also modified the Findings of Fact and Conclusions of Law so as to correct certain relatively unimportant typographical errors (Appendix, p. 81a).

(a) *The Findings of Fact in Relation to the Nature and Scope of the Representations Challenged by the Complaint*

The Administrative Law Judge found (Finding of Fact 25; Appendix, pp. 59a-60a) that the only unlawful representations challenged by the Final Complaint "arise from the 'uniqueness' claim for Fedders air conditioners", and he accordingly concluded (Finding of Fact 26; Appendix, p. 60a) that respondent's advertisements "which utilize 'reserve cooling power', but which do not claim uniqueness for this feature, are not challenged in the complaint".

(b) *Facts Concerning Lack of Impact Upon the Purchasing Public*

Pursuant to the Administrative Law Judge's suggestion (Transcript, p. 70) the parties stipulated in the Second Stipulation of the Parties dated March 12, 1974, hereinafter called "Second Stipulation" (Appendix, p. 33a), the following information with respect to a sample area which included the Florida area, the Washington, D. C. metropolitan area, the Philadelphia metropolitan area and the New York metropolitan area, for respondent's fiscal years ending August 31, 1970 and August 31, 1971, respectively:

- (i) Respondent's total advertising expenditures;
- (ii) the total number of advertisements which utilized the term "reserve cooling power";
- (iii) the expenditures for those advertisements;
- (iv) the number of advertisements claiming reserve cooling power which also claimed that such characteristic was unique to respondent;
- (v) the total expenditures for those advertisements.

The Second Stipulation summarized this information (Appendix, pp. 33a-35a). A ratioanalysis (an analysis by percentages) of this summary was prepared by respondent,

and received in evidence, without objection (Transcript, 94) as Respondent's Exhibits 2A and 2B (Appendix, pp. 92a-95a). The accuracy of the ratioanalysis was conceded (Transcript, p. 93a). Also received in evidence without objection, as Respondent's Exhibits 1-A through Z-55 (Transcript, p. 88) were copies of each of the advertisements containing claims of uniqueness of reserve cooling power which appeared in the sample area during the sample period, together with lists of the newspapers in which such advertisements appeared, the dates of each insertion thereof and the circulation of each such newspaper.

Inspection of the above stipulation and exhibits will demonstrate, among other things, the following salient facts:

(i) Out of respondent's total advertising expenditures in the entire sample area, during the two-year sample period, of \$2,484,000.00, advertisements containing unique reserve cooling power claims constituted only about \$18,000, or roughly, 7/10th of 1%. Indeed, in the New York metropolitan area, which sub-area absorbed the great bulk of the advertising expenditures in the entire sample area, this ratio was an even more insignificant 1/10th of 1%.

(ii) During the same two-year period, in the entire sample area, the ratio of advertisements claiming uniqueness for reserve cooling power to all reserve cooling power advertisements, both in terms of number of insertions and dollar expenditures, was about 6%* (Finding of Fact 19; Appendix, pp. 55a-57a; also Respondent's Exhibit 2B; Appendix, p. 95a). In other words, only one out of every sixteen ads claiming reserve cooling power asserted that it was unique to respondent.

* As set forth in the first page of the Final Order (Appendix, p. 81a) the figure "7.8%" appearing in the Finding of Fact at Appendix, p. 57a, should read "6.5%."

Furthermore, the Administrative Law Judge concluded that there was no "carry-over" effect on consumers from advertisements claiming uniqueness of reserve cooling power to advertisements merely claiming reserve cooling power (Finding of Fact 27; Appendix, pp. 60a-61a).

Respondent's counsel, in an appendix to its Appeal Brief to the Commission, summarized, from respondent's Exhibits 1-A through Z-55, the extent to which unique reserve cooling power claims were "featured" or otherwise emphasized in the advertisements in which they appeared and also the relative circulation of the media in which they appeared. This summary was not challenged and its results were referred to, but only in part, in Finding of Fact 20. The summary has been reproduced, in full, at Appendix, pp. 117a-118a. It reflects the following facts, all further demonstrative of the relatively minor impact of the ads containing the offending claims:

- (i) Most of the insertions containing unique reserve cooling power claims were in publications with a relatively small circulation (Finding of Fact 20; Appendix, p. 57a).
- (ii) In the great majority of instances the unique reserve cooling power claim was not featured or otherwise emphasized in the ad but was usually "buried" in small type among a considerable number of other claims (Finding of Fact 20; Appendix, p. 57a).
- (iii) In publications with a circulation of 150,000 or more, the unique reserve cooling power claim was in no instance featured or otherwise emphasized in the ad in which it appeared (Appendix, pp. 117a-118a).

(c) *Facts Concerning Discontinuance*

As heretofore mentioned, it is undisputed that since December 22, 1971, no reserve cooling power claim of any kind, whether unique or not unique, has been disseminated (Initial Decision, p. 23, first paragraph; Appendix, p. 65a). It is also undisputed, and was found by the Administrative Law Judge, that in furtherance of this discontinuance respondent, on December 22, 1971, notified all of its distributors that they and their dealers were expected to comply therewith (Finding of Fact 28; Appendix, pp. 61a-62a; also Joint Exhibit 1; Appendix, p. 99a). Furthermore, the facts set forth in the affidavit of Sam Muscarnera, respondent's house counsel, sworn to April 15, 1974 (Joint Exhibit 1; Appendix, p. 98a), the truth of which has never been challenged in any respect, indicates that ever since December 22, 1971, respondent, through house counsel, has continuously and conscientiously "policed" its advertising to endeavor to prevent the promulgation of any further unsubstantiated advertising claims, and that, to the best of counsel's knowledge, respondent did not, since that date, promulgate any advertising claim which was not adequately substantiated in all material respects, except for a single harmless and obviously inadvertent lapse referred to in the affidavit.

ARGUMENT

POINT I

The Final Order is impermissibly broad in scope in that it prohibits practices which are not sufficiently "like and related" to the unlawful practice found to have existed, and Paragraphs 2 and 3 of the Final Order should be modified accordingly.

While it is elementary that in framing a cease and desist order the Commission is not limited to prohibiting the offending conduct in the precise form in which it was found to have existed in the past (*F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952)), and that the Commission has the power, within its discretion, to enjoin "like and related practices" (*F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 392-393 (1959)), it is abundantly clear that the Commission's discretion does not extend to enjoining conduct which is not reasonably related to the offending conduct found to have existed. *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946); *Royal Milling Co. v. F.T.C.*, 288 U.S. 212 (1933). Thus, in *Royal Milling, supra*, at 288 U.S. 217, the Supreme Court espoused the principle that

"[t]he order should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public;"

Similarly, in *Siegel, supra*, the Supreme Court stated (327 U.S. at 612-613)

". . . [The Commission] has wide latitude for judgment and the Courts will not interfere *except where the remedy selected has no reasonable relationship to the unlawful practices found to exist.*" (Emphasis added.)

The nub of the question, therefore, is whether in an individual instance the portion of the order falling outside

of the perimeters of the offending conduct already proven has a "reasonable relationship" to that conduct or, expressed somewhat differently, is "reasonably necessary to correct the evil".

This Court, in *Country Tweeds, Inc. v. F.T.C.*, 326 F.2d 144 (2d Cir., 1964) and its antecedent *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480 (2d Cir., 1962), has expressed this general concept of "reasonableness" in terms of whether the conduct prohibited by the Commission insofar as the prohibition goes beyond the bounds of the unlawful conduct proven, is merely a "variation on the basic theme" (see *Vanity Fair Paper Mills, supra*, 311 F.2d at 487, *Country Tweeds, Inc., supra*, 326 F.2d at 149).

Although the courts have not uniformly adopted the above "basic theme" language, this "basic theme" thread is apparent in the cases in which overbroad Commission orders have been stricken down or narrowed. Thus, in *Country Tweeds, Inc., supra*, where the petitioners were guilty of misrepresenting the quality of their cashmere by misusing testing company results, the Commission's order prohibited petitioners from misrepresenting "in any manner" the quality of their fabrics. The Court struck this language as far too broad, saying at 326 F.2d 149:

"It is difficult to imagine an order couched in more sweeping language than the one now before us. Petitioners, found guilty of misrepresenting the quality of their cashmere through the misuse of test results, have been ordered to refrain from misrepresenting 'in any manner' the quality of their fabrics. This Court, subsequent to *Hoving v. F.T.C., supra*, in a series of recent cases dealing with illegal payments to buyers under Section 2(d) of the Clayton Act, as amended, 15 U.S.C. § 13(d), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, has not hesitated to modify broad Commission orders which went beyond the particular illegal practices found to exist. American News

Co. v. F.T.C., 300 F.2d 104 (2d Cir.), cert. den., 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed. 2d 64 (1962); Grand Union Co. v. F.T.C., 300 F.2d 92 (2d Cir. 1962); Swanee Paper Corp. v. F.T.C., 291 F.2d 833 (2d Cir. 1961), cert. den., 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962). See also Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480, 487 (2d Cir. 1963), where the court, though refusing to accept some modifications proposed by petitioner, nevertheless did narrow the order to make it 'somewhat better related to . . . [petitioner's] offending while still sufficiently prohibiting 'variations on the basic theme'."

"The principles which prompted this court in the above cases to narrow Commission orders apply with equal force here, though the violation to which the instant order is directed is deceptive advertising. The First Circuit, on two occasions, has been critical of Commission orders directed to deceptive advertising and labeling which were, in some respects, less broad than the order now before us. *Korber Hats, Inc. v. F.T.C.*, 311 F.2d 358 (1st Cir. 1962); *Colgate-Palmolive Co. v. F.T.C.*, 310 F.2d 89 (1st Cir. 1962)."

In *Country Tweeds*, the "basic theme" in the Court's eyes, was the misuse of testing company results, and the prohibition of misrepresentation "in any manner" obviously encompassed far more than a "variation" on that theme.

Similarly, *Spiegel, Inc. v. F.T.C.*, 411 F.2d 481 (7th Cir., 1969), involved a now familiar type of deceptive promotion; namely, the statement that "you can get three instead of two for a dollar more", when in fact the usual price of three was no greater than the advertised bargain. The Commission's order prohibited "misrepresenting in any manner the savings available to purchasers of respondent's merchandise". The Court, in ordering that this prohibition of the order be stricken, said that if it were adopted

the respondent "might well be fearful of advertising *any kind of sale* of its merchandise in the future". (Emphasis added.) Here, again, the Court obviously considered that although there are many ways in which customer savings can be represented: i.e., "less than our cost", "lowest price in town", "wholesale price", to name just a few, the "basic theme" of the offending practice in the case before it was the false representation as to the normal and usual dollar price per unit of the product.

In *Gimbel Bros. v. F.T.C.*, 116 F.2d 578 (2d Cir., 1941) the respondent was charged with representing mixed goods as being all wool. The Commission's order, in addition to forbidding that practice, forbade the respondent from selling mixed goods as such without describing each constituent fiber in the order of its predominance by weight or specifying the percentages of the different ingredients. The Court struck out this provision as ranging too far beyond the charges in the complaint, observing that it would seem to require the retailer to make a laboratory test of each piece of goods put on sale. Here, again, the "basic theme" was simply false labelling, and the Court in effect refused to permit the Commission to "legislate" by inhibiting claims which were true though not, in the Commission's judgment, sufficiently descriptive.*

In *Korber Hats, Inc. v. F.T.C.*, 311 F.2d 358 (1st Cir., 1965) Korber was charged with deceptive labelling of men's straw hats as "Genuine Milan." The hats in fact were made from Philippine hemp imported from Japan. A portion of the Commission's order directed Korber to refrain from "using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is the fact."

* The substance of the Commission's stricken prohibition was, years later, embraced in the terms of the Federal Wool Products Labelling Act.

The Court, in returning the case to the Commission for other reasons, observed that the order was too broad. Here, again, it is obvious that the "basic theme" was mislabeling of country of origin, and the Court, in disapproving the breadth of the order, obviously considered that its prohibitions should have been confined to that general area.

Cases such as *F.T.C. v. Ruberoid Co., supra*, and *Niresk Industries, Inc. v. F.T.C.*, 278 F.2d 337 (7th Cir., 1960), *cert. den.* 364 U.S. 883 (1960), cited by the Commission as cases in which the courts have sustained orders ranging beyond the ambit of the prior offending conduct, are easily distinguishable on their facts and their results are in harmony with the "variations on the basic theme" principle above referred to. For instance, in *Ruberoid*, the respondent was found to have discriminated in its pricing to customers. Although the discriminations found were consistently in excess of 5%, the Commission's order to cease and desist enjoined *all price discrimination*. The respondent argued that the Commission's order should have been limited to discriminations of 5% or more. The Supreme Court's rejection of this contention was obviously quite consistent with the "basic theme" concept. In *Niresk* respondent had falsely represented the normal and usual price of one of its products, a cooker-fryer. The Seventh Circuit upheld a Commission order enjoining the use of "like advertising" (i.e., advertising falsely representing the usual price of the product) not only in respect to the cooker-fryer, but in respect to any other product of respondent. Here, once more, the "basic theme" or "basic thread" was clearly discernible, namely, false representations as to normal and usual prices, and the Court, again quite consistently with the decisions above discussed, held that the use of like advertising in respect to another product was simply a variation on the same basic illegal theme.

Applying the above "basic theme" principle to the facts in the case at bar, respondent submits that the "basic

theme", "basic type of wrong", or however else the concept should be expressed, is respondent's claim that *any* attribute of its products is unique while in fact such attribute is possessed by the products of others as well. Both the Initial Decision and the Commission's Final Order herein recognize that respondent's claim that its units possess the performance characteristic known as "reserve cooling power" was unchallenged,* and that the only challenge made by the Commission is to the respondent's further claim that its units were unique in this respect.* Expressed somewhat more succinctly, what the Commission is complaining about—is that respondent's ads claimed that its air conditioners were the only ones which had "reserve cooling power", whereas in truth and in fact, the products of certain other manufacturers also possessed that characteristic.

The Final Order being appealed from embraces not only false uniqueness claims of any kind but unsubstantiated claims with respect to the class of performance characteristics within which reserve cooling power falls, i.e., air cooling, dehumidification and circulation, as well. In its Opinion accompanying the Final Order, the Commission asserted that:

"[w]e cannot agree that the false representations here in question dealt only with 'uniqueness' and not 'performance' nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here."

* See Finding of Fact 26 (Appendix, p. 60a) wherein the Administrative Law Judge concluded that "the representative advertisements of Fedders room air conditioners, which utilize 'reserve cooling power', but which do not claim uniqueness for this feature, are not challenged in the complaint" and Finding of Fact 25 (Appendix, pp. 59a-60a) wherein the Administrative Law Judge concluded that "the unlawful representations made by Fedders, which are challenged in the complaint, arise from the 'uniqueness' claim for Fedders air conditioners . . ."

"In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. . . ." (Appendix, p. 90a).

Herein is where the confusion and error lie. The Commission's position appears to be that a claim that a particular performance characteristic of a product is possessed only by claimant's product, is in and of itself a performance claim; and that accordingly, falsely asserting that claimant's product has a particular characteristic or quality is a practice so close, in terms of its basic theme, thrust and effect to the assertion, contrary to the fact, that a concededly substantiated characteristic is an attribute of claimant's product only, that the two types of claims must be considered as "like and related".

What the Commission fails to recognize is that a false claim of uniqueness to claimant of a substantiated performance characteristic is so different, both conceptually and in practical effect, from the falsity of the claim characteristic itself that the two types of claims are insufficiently related to one another to constitute "like and related" practices.

The result is that the Commission's Final Order is inappropriate and impermissibly broad in scope, despite the fact that, in framing its Final Order, the Commission modified the Initial Order, so as to include a limited class of performance characteristics (air cooling, circulation and dehumidification) rather than *all* performance characteristics.

Semantically, we submit that it is self evident that by its very nature a claim that a performance characteristic is unique to claimant is of a different genre than a claim with respect to the characteristic itself. However, semantics aside, the difference in practical effect between, on the one

hand, claiming an attribute for your product which it in fact does not possess, and, on the other hand, claiming that your product is the only one possessing that attribute when in fact other products possess it as well, is a very broad one. For example, compare these three sets of false assertions, and assume each of them was relied upon by a consumer purchaser of the respective product.

Our cleaning fluid will take out ink spots.

Ours is the only cleaning fluid that will take out ink spots.

Our watch is waterproof.

Ours is the only waterproof watch.

Our tire will not skid on wet roads.

Ours is the only tire that will not skid on wet roads.

The assertions in the first column are all clearly performance claims without any added claim of uniqueness. The claims in the second column are all uniqueness claims in respect to the same performance characteristics.

If the claimed performance characteristics induce the respective purchasers, and were misrepresented, the consumers buying the cleaning fluid, the watch and the tire would be completely bilked and defrauded by their reliance thereon. The purchaser of the cleaning fluid, unable to remove the ink spot, would consider his purchase worthless. So would the purchaser of the watch which, when used under water, became inoperative. The purchaser of the tire relying upon the false claim that the tire will not skid on wet roads might suffer severe personal injury.

On the other hand, assuming, in respect to the uniqueness claims in the second column, that the performance claim itself is substantiated, and that the only misrepresentation is that of its uniqueness, the worst that would happen to the purchaser is that, conceivably, he might have bought another bottle of cleaning fluid, another watch or another tire, possessing the advertised attributes, a little cheaper.

We respectfully submit that the difference in practical effect of these different types of misrepresentations necessarily makes them differences in kind, rather than in degree. Expressed somewhat differently, the impact upon a consumer of a misrepresentation confined to the uniqueness of a concededly substantiated performance claim is relatively so slight, as compared with the impact upon the same consumer of a false representation concerning the characteristic itself, that the two types of misrepresentations cannot be considered as "like or related". Expressed still another way, where, as here, the "basic theme" is the falsity of a claim which is confined to uniqueness only, a false claim relating to the characteristic itself is far more than a mere "variation on the basic theme"; it is a distinct and far more serious offense.

Reverting to the facts of the instant case, let us suppose that a consumer is induced to purchase an air conditioner by an advertisement asserting that that product has reserve cooling power. If the assertion is false and accordingly, the unit stops functioning during a spell of unusually hot weather, the consumer is completely frustrated. Relying on a representation which turned out to be false, he has bought a piece of machinery which failed him when he needed it most. But suppose, on the other hand, that that same consumer purchased an air conditioner in reliance upon a representation that it was the only one that had reserve cooling power and suppose, further, that the air conditioner did have this capability (although not uniquely) and accordingly, functioned adequately during the same hot spell. The consumer would have been hurt, if at all, only to the extent of the difference in price, if any, between the unit he bought and the cost of a cheaper but comparable unit of another manufacturer also possessing reserve cooling power. Despite the misrepresentation, he would have received substantially what he bargained for—a unit that could operate satisfactorily during unusually hot weather.

The basic dissimilarity of the two types of claims is further demonstrated¹ by the wide difference in the nature of the proof that would be required to substantiate them. The necessary substantiation for respondent's claim of reserve cooling power, as submitted to the Commission some years ago, was scientific and other objective proof as to the performance of its products. On the other hand, the substantiation for a claim of uniqueness to respondent's product of reserve cooling power would not involve respondent's products at all, but rather would consist of examination of all *other* air conditioners on the market to ascertain whether any of these had "reserve cooling power". The Commission's Final Order recognizes this distinction. Paragraph 1 prohibits the making of any uniqueness claim *unless such is the fact* while Paragraph 2, relating to representations of particular performance characteristics, requires a "reasonable basis for [any] such . . . representations, *which shall consist of competent scientific, engineering or other similar objective material . . .*". (Emphasis added).

Firestone Tire and Rubber Co., Docket 8818, 81 F.T.C. 398 (1972), aff'd 481 F.2d 246 (6th Cir., 1973), cert. den. 42 U.S. L.W. 3362 (Dec. 18, 1973) has been cited throughout the various stages of the Commission's proceedings in support of incorporating performance characteristics into the order promulgated against respondent. That case concerned an unqualified representation by the respondent therein that its tire was "safe", and a further representation that it "stops 25% quicker". The Commission found that both these representations were deceptive, and accordingly enjoined Firestone from representing that any of its tires "have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests" The Court rejected without comment Firestone's argument that the order was impermissibly broad in re-

quiring scientific proof as to *any* safety or performance characteristic advertised.

The critical distinction between *Firestone* and the case at bar lies in the fact that both of the deceptive representations in the former case, i.e., "safe" and "stops 25% quicker" were representations as to performance characteristics. In the case at bar, the unlawful representation was only as to the *uniqueness* of a single performance characteristic.

Furthermore, the Court in *Firestone*, as did the Commission, laid great stress upon the fact that the "stops 25% quicker" claim "involves a matter of human safety" (481 F.2d at 250). It is only natural to suppose that this factor, in and of itself, had considerable weight in inducing the Commission to issue, and the Court to approve, an order of very wide scope.

Up to this point herein, respondent has sought to demonstrate that a false claim as to a performance characteristic (such as, in the instant case, "reserve cooling power") is so different from a false claim as to a concededly substantiated characteristic, in terms of its nature and effect upon the consumer that, quite aside from semantic differences, it may not be considered as sufficiently "like or related" for purposes of including it within the permitted scope of a cease and desist order.

However, there are additional factors, all of which the Commission chose to ignore in considering the question of scope, that have an important bearing on the permitted scope of this or any other cease and desist order. These factors are: the degree of flagrancy of the offending conduct committed, discontinuance of the offending practice prior to the issuance of the complaint and respondent's prior unblemished record with the Commission.

Illustrative of the fact that these factors, among others, should be taken into consideration in the determination of the proper scope of a cease and desist order, are *Joseph A.*

Kaplan & Sons, Inc. v. F.T.C., 347 F.2d 785 (1965); *Country Tweeds, Inc. v. F.T.C.*, *supra*; and *Swanee Paper Corporation v. F.T.C.*, 291 F.2d 833 (2d Cir., 1961), *cert. den.*, 368 U.S. 987 (1962). In *Joseph A. Kaplan & Sons, Inc.*, *supra*, the Court stated at 347 F.2d 789:

" . . . In the exercise of this discretion, the Commission can properly consider many factors, such as the frequency and duration of the violations, the business and competitive history of the respondent, including history of past violations, and the likelihood that the respondent knew or should have known that its conduct was unlawful. This enumeration is by no means exhaustive . . . "

This Court in *Country Tweeds*, *supra*, asserted at 326 F.2d 149:

" . . . We think it advisable again to note that petitioners in this case have ceased to engage in the advertising practice which prompted the order and voluntarily did so well before the Commission filed its complaint. Cessation of the offending activity, with the likelihood that the petitioner will not again resume it or a related activity has been one factor which courts have considered in limiting broad Commission orders. *Grand Union Co. v. FTC*, *supra*, 300 Fed. at 100; *Swanee Paper Corp. v. FTC*, *supra*, 291 F.2d at 838."

And, once again this Court in *Swanee Paper Corporation*, *supra*, at 291 F.2d 838 said:

"Nothing in the record here indicated flagrancy or extensive violations of § 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed."

It is unchallenged that respondent's offending conduct was discontinued long before the filing of the complaint by

the Commission*, and that, except for one minor and harmless exception (see Joint Exhibit 1 of Parties, Appendix, p. 98a), has never been repeated. Respondent must bow to the Commission's determination that these facts were not sufficiently persuasive to induce it to exercise its discretion to dismiss the complaint on discontinuance grounds. However, the fact remains that the offending practice *was* discontinued and that fact should bear weight, in respondent's favor, in the framing of the cease and desist order.

Likewise, respondent's prior record with the Commission should not be ignored. It is a completely clean, unblemished record; no orders or complaints are, and so far as counsel knows, no orders or complaints ever were, outstanding against respondent.

Ascertainment of the degree of flagrancy of the offending conduct in the instant case necessitates consideration of the offending advertising insertions in the totality of circumstances in which they appeared—their place within the general advertising program of respondent and their content and context. Respondent submits that, so considered, its offending conduct, while above the *de minimis* level, was emphatically not flagrant. As set forth in greater detail at pages 7-8, *supra*:

(i) the challenged advertisements, in the sample area, in terms of their cost, constituted only about 7/10 of 1% of respondent's total advertising expenditures in that area;

(ii) on the average, out of every 16 advertisements claiming reserve cooling power, only one claimed that reserve cooling power was unique; and

* See Initial Decision (Appendix, p. 65a) wherein the Administrative Law Judge stated:

"[i]t is undisputed that claims relating to reserve cooling power have been discontinued."

(iii) the offending claim was clearly not a nationally emphasized slogan, since, in most cases, it was in small type, "buried" among a considerable number of other claims, and appeared, for the most part, in publications of relatively small circulation.

The definition of the word "flagrant" is "extremely or deliberately conspicuous; notorious; shocking" (American Heritage Dictionary) or "flaming into notice; notorious; enormous; heinous; glaringly wicked" (Webster's New International Dictionary, unabridged).

From the above discussion of the salient facts, which place respondent's single offending practice in its proper setting, it is abundantly clear that respondent did not "flaunt" the false uniqueness claim in its advertising nor did it embark upon a wide-scale advertising campaign in total disregard for the law. This does not condone the unlawful practice; what it does is to demonstrate that the unlawful conduct fell far short of being "flagrant" in any generally recognized sense.

In conclusion, and by way of summary, respondent maintains that a false claim as to the performance characteristics of air cooling, dehumidification and circulation (the characteristics embraced by the Commission's Final Order), is necessarily so distinct in nature and practical effect, from the false claim of the uniqueness of reserve cooling power (the offending conduct here involved), that the two types of claims are not "like" or "related". Accordingly, respondent maintains that the Commission, in framing the Final Order to encompass within its proscriptions unsubstantiated performance characteristic claims relating to air cooling, dehumidification or circulation, exceeded permissible bounds.

Furthermore, respondent contends that the Commission erred in ignoring, in its determination of the scope of the Final Order, the mitigating factors here present;

namely, discontinuance prior to issuance of the complaint, lack of flagrancy and unblemished F.T.C. record; and that giving these factors the weight that they deserve tilts the balance of the equities here involved still further in respondent's favor.

In light of all of the foregoing, respondent submits that the portion of paragraph 2 of the Final Order, commencing with the beginning of that paragraph and continuing up to, but not including, the words "which shall consist" should be amended so as to read as follows, the suggested modification appearing below in italics:

"Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to *the uniqueness of any of respondent's air conditioners in any material respect*, unless at the time of such representation respondent has a reasonable basis for such statement or representation,"

and that the portion of subdivision (a) of Paragraph 3 of the Final Order, commencing with the words "which claim", and continuing through the end of subdivision (a), be amended so as to read as follows:

"which claim concerns the uniqueness of any feature of any of respondent's air conditioners".

POINT II

In any event, Paragraph 2 of the Final Order should be modified so as to make clear that respondent, when making a basically subjective claim, does not run afoul of its provisions.

Paragraph 2 of the Final Order directs respondent to cease and desist from:

"Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or cir-

culatation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, *which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material . . .*" (Emphasis added)

Many types of possible claims are basically subjective in nature and not susceptible of proof in the nature of "scientific, engineering, or other similar objective material". For instance, consider the following assertion:

"Fedders' air conditioners keep you comfortable during these scorching days."

From an air conditioning standpoint the comfort which any individual derives from an air conditioner is dependent on a number of factors, including, among others, the air cooling capability of the unit in terms of BTU's, the amount of water the unit extracts from the air (its dehumidification capability), and the volume and velocity of the air moved by its fan (its circulation capability). The relative importance of each of these factors varies from individual to individual. Some people prefer a relatively higher temperature (less cooling capacity) and a relatively rapid movement of air. Others, who are "draft-conscious", dislike rapid movement of air and prefer instead that the room be cooler. To others, the removal of humidity is the most important element of their comfort.

Accordingly, Paragraph 2 of the Final Order, as phrased, is unduly and unfairly restrictive, since, in effect, it would forbid respondent from making any assertion which, because of its subjective nature, cannot be substantiated by objective proof. While the Commission may not have intended or anticipated this result, it nevertheless exists.

Respondent accordingly urges that, whatever determination the Court may make with respect to the suggested

modification of Paragraph 2 referred to in Point I above, the portion of Paragraph 2 beginning with the words "which shall consist of" and continuing to the end of Paragraph 2, be amended to read as follows, the suggested modification appearing below in italics:

"which, if and to the extent such statement is objective in nature and capable of objective proof, shall consist of competent, scientific, engineering or other similar objective material or industry-wide standards based on such material;"

CONCLUSION

It is respectfully submitted that the Final Order should be modified so as to limit its scope, and make it inapplicable to basically subjective claims, all in accordance with the suggested revisions set forth at pp. 24 and 26, *supra*.

Respectfully submitted,

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